

are of general public importance. The proposed legislation would provide precedence over all such expedited actions as well as over regular court actions for the demands of random individuals, regardless of the public interest in the satisfaction of their demands. My testimony has already indicated the types of mischievous and dangerous demands which the Government may be called upon to honor. Subsection (b) would make the judiciary, in addition to the executive, the victim of such demands.

Under the discovery rule—34—of the Federal Rules of Civil Procedure a litigant must show “good cause” for obtaining documents from the adverse party. However, since the proposed subsection (b) would open to any plaintiff or defendant in Government litigation Government records to the extent demanded—unless within the eight exceptions—the discovery rule is nullified insofar as the Government is concerned. The adverse party, however, remains protected by that rule. Furthermore, subsection (b) does not allow for the protection for privileged documents permitted under the Rules of Civil Procedure and under 18 U.S.C. 3500 in criminal cases for delivery of Government documents to the court in camera and, if the court finds necessary, sealed for appellate court review.

Finally, it is questionable whether district courts should be invited to engage in a contest with administrators and to punish for contempt any administrator with whose judgment the courts may disagree. If an agency has declined a particular disclosure request, it would be doing so in conformity with its understanding of the law and regulations. The impropriety of a district judge imposing a contempt sentence and arrest upon an officer of an agency who is complying with the agency's regulations was pointed out by the circuit court in a well-known decision reversing the district judge's contempt decision and upholding the officer's adherence to the agency rules. (Appeal of U.S. Securities and Exchange Commission, 226 F. 2d 501 (6th Cir. 1955).)

(4) The doubtful constitutionality of the legislation.

Aside from the questions arising from the text of the proposed legislation, there is the basic question whether the legislation is constitutional. The President has the constitutional responsibility under article II to preserve the confidentiality of documents and information the disclosure of which would be contrary to the public interest in the faithful execution of the laws. The proposed legislation would remove this responsibility from the President and constitute an attempt to exercise it by the Congress. Such action by Congress would appear to violate the separation of powers which is basic to the Constitution. When 5 U.S.C. 22 was amended in 1958 with respect to Government information, and here I am getting into a point in my prepared statement that you commented on this morning, and I may be inaccurate here, the Senate in its debate recognized the constitutional power of the President to withhold information the disclosure of which would be contrary to the public interest—104 Congressional Record, pages 15688–15689, 15696, 1958. I can only say on that, sir, I think you made it abundantly clear that you did not recognize it, and others—

Mr. Moss. I think the House made it abundantly clear that the House did not recognize it.

Mr. SMITH. I do know that upon signing the bill the President made it abundantly clear that he was standing for this position anyway.